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IN THE

Supreme Court of the United States

October Term, 1969

No. 223

ELLEN GOETT, as Administratrix of the Estate of Marvin Paul Goett, Deceased,

Petitioner,

against

UNION CARBIDE CORPORATION,

Respondent,

against

AMHERST BARGE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the final Order of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled matter on March 13, 1969.

Opinions of this Court and of the Courts Below

The opinion of the United States District Court for the Southern District of West Virginia, Charleston Division by Honorable Ben Moore, is unreported and is set out in the appendix to this petition at pages 1a to 6a.

The first opinion of the United States Court of Appeals for the Fourth Circuit, reported at 256 F.2d 449, is set out in the appendix to this petition at pages 7a to 18a.

This Court's granting of writ of certiorari is reported at 359 U.S. 923.

The decision of this Court, reported at 361 U.S. 340, is set out in the appendix to this petition at pages 19a to 30a.

Upon remand by this Court to the United States Court of Appeals for the Fourth Circuit, the second opinion of that Court, reported at 278 F.2d 319, is set out in the appendix to this petition at pages 31a to 37a.

Denial of the second petition for writ of certiorari by this Court is reported at 364 U.S. 826.

Denial of the motion for enlargement of the time to petition for a rehearing unreported to date, is set out in the appendix to this petition at page 38a.

Jurisdiction

This action, arising out of a maritime tort, was brought in the United States District Court for the Southern District of West Virginia, Charleston Division, as a civil action predicated upon diversity of citizenship and jurisdictional amount. The action was subsequently transferred on motion to the Admiralty Division of said Court.

The decree of the trial Court in petitioner's favor was appealed by respondent and was reversed by the United States Court of Appeals for the Fourth Circuit. Judgment was entered on May 27, 1958.

Petition for writ of certiorari was granted by this Court on March 2, 1959.

On January 18, 1960, this Court vacated the judgment of the Court below and remanded the cause to the Fourth Circuit for determination of questions.

The judgment of the United States Court of Appeals for the Fourth Circuit, adhering to its prior decision and rendering judgment in favor of the respondent was entered on April 19, 1960.

Petition for writ of certiorari was denied on October 10, 1960.

Motion to the United States Court of Appeals for the Fourth Circuit, for enlargement of the time to petition for a rehearing and, upon rehearing, to reverse its prior decision and to enter judgment in favor of petitioner, was denied on March 13, 1969.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Question Presented

1. Did the Court below project sound judgment and discretion in denying the motion for enlargement of the time to petition the Court for rehearing under the circumstances of this case, to wit: the decision in petitioner's favor by the trial Court that respondent was negligent; the reversal by the Court below; the decision by this Court remanding the matter back to the Court below for determination of the standard of law to be applied and whether the prior decision of the Court below was correct under that standard; the decision by the Court below setting the standard and affirming its prior decision thereunder; and the ultimate statement by the Court below in *Van Horn* v. *Gulf*, 388 F.2d 636 (1968), that it was in error in *this* matter in concluding that there was no duty upon the shipowner-respondent under that standard to warn petitioner-decedent, hence no liability upon the respondent—in view of decisions by this Court reversing prior decisions when it was felt that an unjust and unfair decision had been rendered—in view of the present opinion by the Court below that its decision in *this* matter was erroneous—and in

view of the fact that the recently enacted Federal Rules of Appellate Procedure now permit an enlargement of the time for rehearing, by motion, for good cause.

Statutes Invoked

Federal Rules of Appellate Procedure, Rule 26(b).

Federal Rules of Appellate Procedure, Rule 40(a).

Statement of Facts

This cause of action arose out of the death of Marvin Paul Goett, who drowned in the Kanawha River in West Virginia following an industrial accident aboard respondent's vessel. His widow, as Administratrix of his Estate, brought the suit in the United States District Court for the Southern District of West Virginia, Charleston Division, on February 7, 1956.

A trial was held before Honorable Ben Moore, in Admiralty, on May 13, 14 and 15, 1957.

The Findings of Fact and Conclusions of Law by the trial Court (appendix, pages 1a to 6a), predicated respondent's liability to the plaintiff upon the negligence of the respondent in failing to equip the barge with reasonably effective and available safety and rescue equipment, knowing that men would work on the barge in a sandblasting operation.

Damages were limited to $20,000, the amount of the monetary limitation of the West Virginia Wrongful Death Act (§ 5474 and § 5475 of the West Virginia Code), the Court holding that actual damages, had they not been limited by statute, were $50,000.

On appeal to the United States Court of Appeals for the Fourth Circuit, the judgment was reversed, the decision

of the Court based upon the proposition that the shipowner's duty upon delivery of the barge to the shipyard (Goett's employer) was to warn the contractor and its employees of any hidden danger or latent defect on the barge; and since there was none, no liability could exist. It was held to be the duty only of the contractor to supply its employees with a reasonably safe place in which to work. The decision is reported at 256 F.2d 449, and is set forth in the appendix herein at pages 7a to 18a.

Petition for writ of certiorari was granted by this Court and the decision of the Court on January 18, 1960, 361 U.S. 340, vacated the judgment of the Court below and remanded the case to that Court for a specific determination as to whether, *inter alia*, the West Virginia Wrongful Death Act employed the West Virginia or the General Maritime Law standard of negligence and whether the finding of the trial Court was correct under that criterion. The decision is set forth in the appendix herein at pages 19a to 30a.

On remand, the United States Court of Appeals for the Fourth Circuit adhered to its previous decision in favor of the respondent. The thrust of the second opinion, dated April 19, 1960, reported at 278 F.2d 319 and set down in the appendix herein at pages 31a to 37a, was that the West Virginia statute incorporated the General Maritime Law concept of negligence and that under that law, the respondent's sole duty was to warn of hidden dangers or latent defects, with emphasis resting upon control of the vessel *at the time of the injury.*

In limiting the standards of the General Maritime Law to duty only to warn of dangers, the Court below took a path rejected by this Court in *Kermarec* v. *Compagnie*, 358 U.S. 625, and in *United* v. *Halecki*, 358 U.S. 613, a path not followed by other Courts and one which the Court of Appeals for the Fourth Circuit itself rejected in its recent decision in *Van Horn* v. *Gulf*, 388 F.2d 636. That latter decision re-examined the entire question of the standard of

care to be applied under the General Maritime Law. The *Van Horn* case again involved a dangerous condition in existence at the time of delivery of a vessel to the contractor. The Court, discussing the concept applied in *Goett*, that lack of control over the vessel *at the time of injury* negated any duty by the shipowner except to warn of hidden dangers or defects when turning the vessel over, agreed that "* * * Goett's statements about negligence no longer appear sound" (page 638).

Relying upon *Kermarec* v. *Compagnie, supra,* and *United* v. *Halecki, supra,* (which it had deemed were inapplicable in *Goett*), the Court rejected any distinctions based upon land law in declaring that, "a shipowner who delivers his vessel to drydock exercise due care under all the circumstances to provide a reasonably safe place to work for those who foreseeably will come aboard to service the vessel" (page 638). Further, the Court rejected the reasoning that lack of control *at the time of injury* was of importance, holding, rather, that control *at the time of creation of the negligent condition* was pivotal.

As such, and with the finding by the trial Court in *Goett,* (which the Court below had paraphrased as follows, "That Carbide should have foreseen that many of Amherst's employees would work on the barge; that under these circumstances it was negligence for Carbide not to equip the barge with safety and rescue equipment . . .", proximately causing Goett's death (256 F.2d 449, 452-453), there would seem to be good cause in the interests of justice and fairness to grant this petition for writ of certiorari in light of the now settled opinion that the concept laid down in the *Goett* decision in 1960 no longer appears sound; that the recently enacted Federal Rules of Appellate Procedure, effective July 1, 1968, adopted by the Court below, permits an enlargement of the time for a motion for rehearing; and that previous decisions of this Honorable Court in *Gondeck* v. *Pan American,* 383 U.S. 25; *Boudoin* v.

Lykes, 350 U.S. 811; and *Cahill* v. *New York*, 351 U.S. 183, where unfortunate judicial results, which this Court could right on a motion to recall and to amend, were corrected.

Federal rules of appellate procedure:

> "RULE 26. COMPUTATION AND EXTENSION OF TIME
>
> • • •
>
> (b) ENLARGEMENT OF TIME. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; . . ."
>
> • • •
>
> "RULE 40. PETITION FOR REHEARING
>
> (a) TIME FOR FILING; CONTENT; ANSWER; ACTION BY COURT IF GRANTED. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present."

The opportunity to right the wrong to the widow and three children of Marvin Paul Goett is now open to this Court as an affirmative declaration that the recent enactment of Appellate Rules was the fruit of a conscious effort to enhance and liberalize procedures open to those persons who had been erroneously or unjustly deprived of their rights. The *Goett* decision by the Court below stands as a rejected principle of law in the continuing effort to expand the rights of maritime workers. It was to determine standards on the issue of supremacy of conflicting law that led this Court to remand the case to the Court below in 1960. As in *Gondeck* v. *Pan American, supra*, we now have an unfortunate result, not followed, and which certainly will not be followed from this time on, a situation in which the defeated widow and three children of the deceased must bear the

brunt of a decision which has been righted in all manner except for a decree of damages in her favor. To Mrs. Goett and her children who depended upon the love and earning capacity of Marvin Paul Goett, the decision by the Court below in *Van Horn* v. *Gulf, supra,* is small comfort for the nine years since past. The Court below has now determined that her position in the case was correct and that she should have recovered a judgment in 1960. This was not a matter of subtle distinction between cases but was the result of an expression by the Court below that continued examination of an issue can result in change. This Court saw fit to similarly act in *Gondeck* v. *Pan American, supra*; in *Boudoin* v. *Lykes* and in *Cahill* v. *New York, supra.*

See also: *Clark* v. *Manufacturers,* 337 U.S. 953, 338 U.S. 241; *Stone* v. *White,* 300 U.S. 643; *Zap* v. *United States,* 330 U.S. 800; *Land* v. *Dollar,* 341 U.S. 737, 343 U.S. 973.

The cry of finality of litigation, in those instances where the Court itself has forthrightly admitted its error, must be rejected in favor of justice and equity. The suit was for a money judgment only. The decision in 1960 did not require the parties to establish new commercial positions, nor will the granting of the relief now requested. It will involve nothing more than an equitable payment of damages in the amount originally determined by the trial Court in 1957. No further steps will be necessary other than an affirmance of the Findings of Fact and Conclusions of Law of the trial Court. It is respectfully urged, in the interests of justice and fairness, that this Court grant this petition for writ of certiorari and that the judgment in favor of the respondent be reversed.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated: June 9, 1969.

Respectfully submitted,

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APPENDIX

Findings of Facts and Conclusions of Law of the District Court (Honorable Ben Moore)

The Court: I am going to make a finding of fact and conclusions of law, and in doing so I do not expect to discuss the facts or the law any further than is enough to show an appellate court, if the case should be appealed, the basis on which I rest the findings both of fact and of law.

The findings of fact, then, are these:

First: There was no safety or rescue equipment on the barge from which the plaintiff fell to his death.

Two: It was foreseeable to defendant Union Carbide and Carbon Corporation, as its name was then—is that its name then or now?

Mr. Love: Then. That's the name in the case.

The Court: That in the sandblasting operations which they knew or should have known would be carried on on the barge by Amherst Barge Company for the purpose of the work that was then being done on the barge that many men would work on the barge in the manner Goett was working.

Three: That under these circumstances it was negligence for Union Carbide and Carbon Corporation to omit equipping the barge with reasonably effective and available safety and rescue equipment.

Four: The barge was not seaworthy at the time Goett was drowned for all the circumstances in which it was being used.

Findings of Facts and Conclusions of Law of the District Court (Honorable Ben Moore)

Five: Failure to provide rescue equipment was the proximate cause of Goett's death.

Findings of fact as to damages: the court finds that the amount which is fair and just to cover the intangible damages of the deceased's family, including mental anguish and bereavement, is the sum of $5,000, that in addition to damages for those elements the court finds that the distributees suffered financial and pecuniary loss in an amount exceeding, when added to the $5,000, the sum of $20,000, and that therefore under the rule of law which I apply to this case the amount of damages that are to be included in the recovery is $20,000.

I find that no punitive damages are proper in this case.

Proceeding, as was suggested, to find what would be the recovery in case the limitation set down by the West Virginia wrongful death statute is not applicable, I find these facts with reference to damages: that the reasonably expected annual earnings of Mr. Goett which would have been attributable to the expenses of his family rather than his own expenses, is $1500 a year for the entire expectancy of thirty-six years and in arriving at that figure I take into consideration the fact that by the time of the expiration of his expectancy Mr. Goett would be a fairly old man and that he could not reasonably be expected, in view of the general health hazards of life, to earn during his entire expectancy the amount that he earned during the immediate week preceding his death, but that he probably would earn an amount for the whole length of time which would average what he made in the six months before his death, which would mean about $2800 a year, and I find that of that sum it would be reasonable to assume that he would use all but $1500 for his own maintenance expenses; so if he earned $1500 a year for thirty-six years, he would in that time earn $54,000 applicable to the expenses of his family.

Findings of Facts and Conclusions of Law of the District Court (Honorable Ben Moore)

I think that the present work of that sum of money should be calculated on a four per cent basis rather than a three per cent basis. Calculated on a four per cent basis, I find that it amounts to $31,400.

I find further that the amount which is fair and just to compensate for the nurture of the deceased's daughter, who was living with him for the period of her infancy, is $5,000; and I further find that the amount which is fair and just to compensate for the pain and suffering of Mr. Goett himself and other intangible losses which are properly compensable under the rules of admiralty is $3600, all of which added together produces a total of $50,000 as the grand total, which would be a fair and just award if there were no limitation as fixed by the West Virginia statute.

Conclusions of law are as follows: I find that this case is not one for the applicability of the doctrine of liability without fault. I think this is a negligence case and that negligence has been shown, as I have said.

I conclude that it was the duty of Union Carbide and Carbon Corporation under the circumstances of this case to provide both reasonable safety equipment in order to furnish workmen who worked on the barge a safe place to work, and I am thinking in that connection of measures such as life lines or stanchions, as they are called, to prevent falling off the unprotected deck; and it was also the duty of Carbide to provide reasonably suitable rescue equipment, which it was their duty to place in a position on the barge where it would be immediately available in case of need.

I find further as a conclusion of law that Union Carbide and Carbon Corporation is not responsible for any negligence, if such there was, on the part of Amherst Barge Company in not furnishing to the workmen the life jackets that made up a greater part of the testimony.

Findings of Facts and Conclusions of Law of the District Court (Honorable Ben Moore)

On the question of contributory negligence my conclusion is that Mr. Goett was not guilty of any negligence that contributed to his death. 1, in explanation of that, conclude that it is the burden of the one alleging contributory negligence to prove that contributory negligence by a preponderance of the evidence.

Under the evidence in this case it is quite possible and just as probable to my mind that Goett may have accidentally fallen without any negligence at all on his part as that he negligently went over the side. There are many constructions on the deck, some of the close to the edge, and he may have struck one of those, and if he did there is no evidence that he was negligent in so doing.

As to the doctrine of assumption of risk, I conclude that under the circumstances of this case Goett did not assume the risk of the danger which caused his death. I think it is not necessary to decide whether he did or did not assume the risk of falling over the side of the boat. It was not the fall that caused his death. The cause of his death, as I have found in my findings of fact, was the failure of Union Carbide and Carbon Corporation to have available rescue equipment, and that is a risk which I conclude Goett did not assume.

The final conclusion of law is that the plaintiff is entitled to recover against defendant Union Carbide and Carbon Corporation in the sum of $20,000. The other findings with reference to damages are cut off by my decision that the limitation in the West Virginia statute applies to this case, so I make no conclusion of law with reference to the excess damages except to say that if my conclusion is correct that the limitation applies, that the plaintiff is therefore not entitled to recover in this action anything beyond $20,000.

Findings of Facts and Conclusions of Law of the District Court (Honorable Ben Moore)

June 24, 1957

Bluefield, West Virginia

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In re: Goett, Admx. v. Union Carbide & Carbon Corp.,
v. Amherst Barge Company, a Corp.
Civil Action No. 1755

Gentlemen:

At the conclusion of the hearing in this case which was tried by the Court as a case in admiralty, plaintiff was awarded a judgment of $20,000 against defendant Union Carbide & Carbon Corporation. No decision was made at that time with reference to the rights if any, of that defendant against the third-party defendant, Amhurst Barge Company. Counsel for the third-party plaintiff and the third-party defendant were requested to file briefs, which they have done.

In connection with the brief of the third-party plaintiff the Court was asked to make certain findings of fact and conclusions of law.

Requested findings of fact is as follows:

"The Court finds that Amherst Barge Company, third-party defendant herein, had exclusive custody, care and control of the unmanned tank barge CC-204 at the time Mr. Goett, plaintiff's decedent, fell therefrom."

I now make this finding of fact, deleting therefrom however the word "unmanned," since it is my opinion that the barge was not at the time an unmanned barge.

Other requested findings, which I deem to be findings of fact but which are requested as conclusions of law, are to the effect that the third-party defendant was negligent

in not furnishing a life jacket to Mr. Goett and requiring him to wear it while performing his work; and in not erecting stanchions or railing around the edge of the deck of the barge.

I have already found as a fact that no negligent act of the third-party defendant contributed proximately to cause the death of Mr. Goett. I now further find as a fact that under all the circumstances disclosed by the evidence the third-party defendant was not negligent in not furnishing the life jacket and requiring Goett to wear it. I further find that while the preponderance of the evidence, in my opinion, did not show that the absence of stanchions or railing contributed proximately to Goett's death, the third-party plaintiff, and not the third-party defendant, was negligent in not erecting such stanchions or railing.

Having made these findings of fact, counsel are advised that I have carefully considered the briefs submitted to me, the authorities cited, and the arguments made; and my conclusion of law is that there is no liability from the third-party defendant to the third-party plaintiff arising out of the judgment herein awarded to plaintiff Ellen Goett, Administratrix, etc., aganist defendant Union Carbide & Carbon Corporation.

It is suggested in the brief the third-party plaintiff that the court may wish to hear evidence as to whether or not Amherst purchased the insurance required by its contract with Carbide.

I am of opinion that the contract is not in any sense ambiguous, and further, that it is immaterial to the decision of the present controversy whether Amherst did or did not purchase such insurance.

An Order may be entered in accordance with the views expressed in this letter.

Opinion of the United States Court of Appeals for the Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7588

Union Carbide Corporation, a corporation,
Defendant and Third Party Plaintiff below,
Appellant and Cross-Appellee,

versus

Ellen Goett, As Administratrix of the
Estate of Marvin Paul Goett, deceased,
Plaintiff below,
Appellee and Cross Appellant,

and

Amherst Barge Company, a corporation,
Third Party Defendant below,
Appellee.

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON.

(Argued April 9, 1938. Decided May 27, 1938.)

Before SOBELOFF, *Chief Judge*, SOPER, *Circuit Judge*, and THOMSEN, *District Judge*.

Charles M. Love (Dayton, Campbell & Love, and Charles R. McElwee on brief) for Union Carbide Corporation,

Appellant and Cross-Appellee; Harvey Goldstein (E. Franklin Pauley and S. Eldridge Sampliner on brief) for Ellen Goett, as Administratrix etc., Appellee and Cross-Appellant; and David D. Johnson (Jackson, Kelly, Holt & O'Farrell, and W. T. O'Farrell on brief) for Amherst Barge Company, Appellee.

THOMSEN, DISTRICT JUDGE:

Marvin Paul Goett, an employee of Amherst Barge Company, while sandblasting a tank barge owned by Union Carbide & Carbon Corporation, fell into the Kanawha River and was drowned. The barge had been turned over to Amherst for repairs and improvements and was under its sole control. Since the barge was an unmanned barge, it had no life rings or other rescue equipment. The principal question to be decided on this appeal is whether Carbide is liable to Goett's administratrix either for negligence or unseaworthiness because the barge was not so equipped.

Carbide was the owner of the CC-204, an unmanned steel tank barge, with a flat deck. Except for pipe lines it had no superstructure of any kind, but there were kevels along the outer edges of the deck to assist in mooring. It had no railing around its deck and was not equipped with any life rings or similar rescue equipment. Applicable Coast Guard regulations do not require that such barges be equipped with railings or life buoys[1], and it is not customary for such barges to be so equipped. The barge and its equipment had been inspected, certified and approved by the Coast Guard; the certificate of inspection issued on April 1, 1955, granted permission for navigation as an unmanned tank barge on rivers and inland waters tributary to the Gulf of Mexico, approved for use without equipment other than fire extinguishers.

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[1] 14 U.S.C.A. 63; 46 C.F.R. 31.15-5, 32.01-10, 33.40-5 (now 33.40-10).

Amherst owns and operates a repair dock, with marine ways on the Kanawha River at Reed, West Virginia. In October, 1955, Carbide contracted with Amherst for a biennial drydocking, certain welding, repairs and improvements to the barge, including installation of twenty-four Butterworth hatches and painting, not only of the deck and boot topping but also of the bottom and sides, with preparation for the painting by means of sandblasting. The work was to be done in accordance with Carbide's written specifications. A large portion of the painting had to be performed in drydock, but the details of the work were at the discretion of Amherst, which had exclusive control of the barge during the performance of the contract, subject only to the specifications.

In contemplation of such repairs, the barge was delivered to Amherst's dock at Reed, West Virginia, on October 2. Carbide's supervisor of barge maintenance went on board the barge on the following day with Amherst's maintenance superintendent, to point out and discuss the work that was to be done.

No officer, crewman, watchman or other person employed by Carbide was left on or with the barge after it was delivered to Amherst; it was in the exclusive care, custody and control of Amherst on October 5, when Goett was drowned. The barge was then afloat on the Kanawha River, lying along shore, near Amherst's marine ways; it was moored to and against the head of a digger boat, which lay downstream from the barge. The digger boat was attached to the shore by a semi-permanent ramp, which was the means of access to the barge from the shore. A ring-type life buoy with a line attached was mounted on the digger boat.

Goett, an employee of Amherst, while sandblasting the deck surface of the barge, fell into the Kanawha River and was drowned. He had been on the barge on October 4 to

move the sandblasting equipment aboard, and began work in the morning of October 5. The sandblasting equipment consisted of a heavy machine sitting on the deck of the barge, but movable from place to place, with two hoses leading from the machine. Goett was holding the nozzle of one of the hoses in his hands, and was directing the sandblast against the surface of the deck while he walked slowly across it. He was wearing a canvas hood over his head and shoulders to protect him against flying sand from the sandblaster and was also wearing a respirator. He was not wearing a life jacket, although life jackets were available in Amherst's supply house to any employee who desired to wear one while at work. The great majority of Amherst's employees preferred not to wear life jackets, and they were not required to do so. When last seen on the barge, Goett was walking slowly backward towards a kevel at the outboard edge of the barge. A minute later Goett's fellow workmen on the barge heard the noise of the nozzle thrashing against the side, ran to the edge of the barge and looked over. Goett was in the river, just outboard of the position in which he was last seen on the barge. Three men immediately went into the river to save him, but Goett fought them off and prevented them from keeping a grip on him. After several minutes he slipped beneath the surface and was drowned. About that time, Amherst's maintenance superintendent arrived on the scene and threw a life buoy off the digger boat into the water, but it was too late.

Goett's administratrix filed a civil action against Carbide in the Southern District of West Virginia based upon the West Virginia Wrongful Death Statute[2], alleging that

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[2] W. Va. Code, 1955: "§ 5474. [5] Action for Wrongful Death. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in

Goett's death was due to the failure of Carbide to have rescue equipment aboard the barge. Carbide brought in Amherst as a third party defendant, alleging that by express and implied contract, it was entitled to indemnity. Answers were filed by Carbide and by Amherst, denying liability and raising the defenses of contributory negligence and assumption of risk. On plaintiff's motion, over the objection of Carbide and Amherst, the case was transferred to the admiralty side of the court.

The district judge found as facts: that Carbide should have foreseen that many of Amhurst's employees would work on the barge; that under these circumstances it was negligence for Carbide not to equip the barge with safety and rescue equipment; that the barge was not seaworthy at the time Goett was drowned for all the circumstances in which it was being used; that failure to provide rescue equipment was the proximate cause of Goett's death; and that Amherst had exclusive custody, care and control of the barge at the time Goett fell therefrom.

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every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter. No action, however, shall be maintained by the personal representative of one who, not an infant, after injury, has compromised for such injury and accepted satisfaction therefor previous to his death.* * *"

"§ 5475. [6] Party Plaintiff in Such Action; Damages; Distribution; Limitation.—Every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate, left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just not exceeding ten thousand dollars: Provided,

The judge concluded: "this case is not one of the applicability of the doctrine of liability without fault. I think this is a negligence case and that negligence has been shown * * *"; that it was the duty of Carbide to furnish workmen who worked on the barge a safe place to work, and to that end to provide safety equipment, such as life lines or stanchions, to prevent their falling off the unprotected deck; that it was also the duty of Carbide to provide reasonably suitable rescue equipment, and to place such equipment in a position on the barge where it would be immediately available in case of need; that Goett was not guilty of any negligence contributing to his death; that Goett did not assume the risk of the failure of Carbide to have rescue equipment available; that plaintiff is entitled to recover $20,000 against Carbide, but that if the limitation in the West Virginia

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however, if the plaintiff in such action shall prove by a preponderance of the evidence financial or pecuniary loss sustained by a distributee or distributees of such deceased person in an amount exceeding the sum of ten thousand dollars the jury may give such damages as shall equal such financial or pecuniary loss, not exceeding twenty thousand dollars as the total of all damages recoverable in such action, and the amount so recovered shall not be subject to any debts or liabilities of the deceased. Every such action shall be commenced within two years after the death of such deceased person."

§ "5477. [8] When Action Not to Abate; Survival of Action for Personal Injury against Wrongdoer; Time Within Such Action Must Be Brought.—Where an action is brought by a person injured for damage caused by the wrongful act, neglect or default of any person or corporation, and the person injured dies pending the action, the action shall not abate by reason of his death but, his death being suggested, it may be revived in the name of his personal representative, and the declaration and other pleadings shall be amended so as to conform to an action under sections five and six of this article, and the case proceeded with as if the action had been brought under said sections. But in such case there shall be but one recovery for the same injury. * * *"

Wrongful Death Act did not apply, plaintiff would have been entitled to recover $50,000; and that Carbide is not entitled to indemnity from Amherst.

The maritime law does not allow recovery for wrongful death. *The Harrisburg,* 119 U.S. 199. In 1920 Congress adopted an act to provide a remedy for wrongful death on the high seas, 46 U.S.C.A. 761 et seq., but there is no similar act where the death occurs on inland waters, unless the claim is against the employer of a deceased seaman and therefore covered by the Jones Act, 46 U.S.C.A. 688. The Supreme Court has held, however, that "where death upon such waters results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given." *Western Fuel Co.* v. *Garcia,* 257 U.S. 233, 242; *Levinson* v. *Deupree,* 345 U.S. 648, 650. The West Virginia Wrongful Death Act, like other statutes patterned on Lord Campbell's Act, has created a new cause of action for the benefit of certain named beneficiaries, and has not perpetuated the cause of action which the deceased had before his death. *Dunsmore* v. *Hartman,* 140 W. Va. 357, 84 S.E.2d 137; *Gulf, C & S, F. T. Co.* v. *McGinnis,* 228 U.S. 173; *Continental Casualty Co.* v. *The Benny Skou,* 4 Cir., 200 F.2d 246, 248, *cert. den.* 345 U.S. 992.

The right to maintain such a suit can be enforced in admiralty only in accordance with the substantive law of the state whose statutes is being adopted. The endowment must be taken *cum onere. The Harrisburg; Levinson* v. *Deupree; Continental Casualty Co.* v. *The Benny Skou; Garrett* v. *Moore-McCormick Co., Inc.* 317 U.S. 239, 245; *Curtis* v. *A. Garcia y Cia,* 3 Cir., 241 F.2d 30, 35. It has been gen-

erally held that any limitations in the state statute as to when suit must be brought, or the amount and character of damages which may be allowed, are binding on the admiralty court. See e.g. *Western Fuel Co.* v. *Garcia; Continental Casualty Co.* v. *The Benny Skou; Quinette* v. *Bisso*, 5 Cir., 136 F. 825, *cert. den.* 199 U.S. 606. A cause of action for damages accrued prior to a decedent's death, whether based on unseaworthiness or on negligence, will survive if the applicable state statute so provides. *Kerman* v. *American Dredging Co.*, 355 U.S. 426, at 430, n.4; *Curtis* v. *A. Garcia y Cia; Holland* v. *Steag, Inc.*, D.Mass., 143 F. Supp. 203; *Meade* v. *Luksefjell*, S.D.N.Y., 148 F. Supp. 708, Cf. *Cox* v. *Roth*, 348 U.S. 207; *Just* v. *Chambers*, 312 U.S. 383. Unlike statutes in some states, the pertinent West Virginia statute permits such survival only if an action has been commenced before the decedent's death, and requires that such action be conformed to an action for wrongful death. W. Va. Code, 1955, § 5477. [8]; *Railing* v. *Case*, N.D.W. Va., 131 F. Supp. 754; *Alloy* v. *Hennis Freight Lines*, 139 W. Va. 480 80 S.E.2d 514. Of course, no such action was filed by Goett.

In the instant case liability for Goett's death is claimed on the basis both of unseaworthiness and of negligence.

A. There is a division of opinion whether a suit under a statute like the West Virginia Wrongful Death Act can be based on unseaworthiness. Cf. *Lee* v. *Pure Oil*, 6 Cir., 218 F.2d 711, 714, and *Graham* v. *A. Lusi Ltd.*, 5 Cir., 206 F.2d 223, with *Halecki* v. *United New York*, 2 Cir., 251 F.2d 708, and *Skovgaard* v. *The M/V Tungus*, 3 Cir., 252 F.2d 14, nothing the strong dissents in both *Halecki* and *Skovgaard*. See also *Kernan* v. *American Dredging Co.*

It is not necessary for us to decide whether a suit in admiralty under the West Virginia Act can ever be based upon unseaworthiness, because Goett was not a person to

whom the warranty of seaworthiness ran, and because we do not agree with the finding of the district judge that the barge was unseaworthy.

The right to sue for injuries caused by unseaworthiness, which seamen have had since *The Osceola,* 189 U.S. 158, was extended to stevedores in *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, 89, because they were "doing a seaman's work and incurring a seaman's hazards", and to carpenters in *Pope & Talcot* v. *Hawn,* 346 U.S. 400, 413, because: "The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law." See also *Alaska S.S. Co.* v. *Petterson,* 347 U.S. 396, and *Rogers* v. *United States Lines,* 347 U.S. 984. We extended the right to a watchman, supplied by an independent contractor, who was doing work customarily done by an officer or member of the crew. *Ross* v. *The Zeeland,* 4 Cir., 240 F.2d 820.

Since the decision below, however, this court has adopted the opinion of Judge Chestnut in *Raidy* v. *United States,* D.Md., 153 F. Supp. 777, aff'd, 4 Cir., 252 F.2d 117, wherein he noted that the admiralty doctrine of unseaworthiness sprang from a consideration of the particular hazards affecting the crew of a ship in navigation. Raidy was a shipyard worker who was performing duties not within the competence or the customary activities of the crew. The ship

was in drydock for structural changes; she was not subject to any of the perils of navigation. The crew had been discharged. The owner maintained no control over the work being done by the independent contractor other than the right to inspect to determine whether the structural changes were being performed in accordance with the specifications. We concluded that Raidy's status was very different from that of a seaman and that it was a "misnomer" to speak of the removable and absent footplate through which he fell as "unseaworthiness of the ship." 252 F.2d at 118. See also *Berryhill* v. *Pacific*, 9 Cir., 238 F.2d 385, *cert. den.* 354 U.S. 938; *West* v. *United States*, E.D.Pa., 143 F.Supp. 473; *Berge* v. *National Bulk Carriers*, 2 Cir., 251 F.2d 717. Cf. *Halecki* v. *United New York* and *Skovgaard* v. *The M/V Tungus*.

In *Sieracki*, *Hawn* and *Petterson*, the vessels were in the general control of their officers, loading cargo, when the longshoremen and carpenters were hurt. Those cases hold that an owner's duty to provide a seaworthy vessel, with appurtenant supplies and equipment, is not affected by the relinquishment to another, such as a stevedoring company, of control of a portion of the ship or of a particular operation, such as loading.[3] In the instant case, however, the barge had been temporarily withdrawn from navigation and delivered into the sole custody and control of Amherst, the drydock company. While in extent the work was not as great as in *Berryhill*, *Berge* and *Raidy*, in character it was the same, because it could not be done by the regular crew, but required that the vessel be withdrawn from navigation

[3] See discussion in *Alaska S.S. Co.* v. *Petterson*, 205 F.2d 478, at 479.

and turned over to a drydock company having special facilities and equipment for the work. The work order called for drydocking of the vessel; without such drydocking the bottom and sides of the barge would have been inaccessible. The warranty of seaworthiness does not apply in that situation.

The barge was not unseaworthy. In its ordinary operations, it was unmanned, and did not require life saving equipment. It did not become unseaworthy when men went aboard after it had been turned over to a repair yard under the circumstances of this case. *Lester* v. *United States*, 2 Cir., 234 F.2d 625, *cert. den.* 352 U.S. 889.

B. Nor was Carbide negligent in delivering the barge to Amherst without mounting life rings or other safety equipment on the barge, or in failing to rescue Goett after he fell into the river, as contended by his administratrix. There is, of course, a duty on a vessel and her owners to have life saving equipment available to rescue members of her crew who fall overboard while the vessel is in operation. *Sadler* v. *Pennsylvania*, 4 Cir., 159 F.2d 784, and cases cited. A similar duty is owned to business visitors who come aboard while the vessel is in the custody and control of her officers or other representatives of the owners. But in the instant case Carbide had delivered the barge into the sole custody and control of Amherst. Carbide's duty under those circumstances was to warn Amherst and its employees of any hidden danger or latent defect. There was no hidden danger or latent defect in the barge. It was the duty of Amherst to supply its employees with a reasonably safe place in which to work. It knew and controlled the conditions of the work and the equipment which would be used. It was Amherst's responsibility to decide whether a tempo-

rary railing on stanchions should be erected, whether its men should be required to wear preservers, and whether and where life rings and other rescue equipment should be mounted. For negligence in any of these respects it would be liable to plaintiff herein for damages, were it not for the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901-950.[4] But Carbide is not liable to plaintiff for negligence; it breached no duty it owned to Goett. *Lester* v. *United States; West* v. *United States; Raidy* v. *United States;* 38 Am. Jur., Negligence, sec. 97; Restatement, Torts, sec. 340, 343; Harper and James, *The Law of Torts,* vol. 2, sec. 21.1.

Judgment should have been entered in favor of defendant. This decision makes it unnecessary to pass on the other questions raised by the several parties.

Reversed.

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[4] Under the terms of that Act Goett's wife and children are now entitled to receive, without proof of negligence on anyone's part, compensation which may exceed the maximum amount recoverable under West Virginia Wrongful Death Act.

Decision of the Supreme Court of the United States

SUPREME COURT OF THE UNITED STATES

No. 3—October Term, 959.

Ellen Goett, as Administratrix of the Estate of Marvin Paul Goett, Deceased,

Petitioner,

v.

Union Carbide Corporation and Amherst Barge Company

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

[January 18, 1960]

Per Curiam:

This was a libel in admiralty brought against respondent Union Carbide Corporation by petitioner, the administratrix of Marvin Paul Goett. Goett had been an employee of respondent Amherst Barge Lompany, which was engaged in repairing a river barge owned by Union. The decedent was working on the barge when he fell off into the waters of the Kanawha River, and, after fruitless efforts at rescue, was drowned. The theory of the libel was that, alternatively, Union was negligent in turning over the barge to Amherst without its being equipped with rescue equipment, or that the vessel was unseaworthy without such equipment; and that the lack of rescue equipment caused the decedent's death. The accident had taken place in West Virginia waters and that State's Wrongful Death Act was relied upon. The District Court found that the vessel was in fact unseaworthy and that Union was negligent in the respect charged, causing the death of decedent, and that the decedent was not

shown to have been guilty of contributory negligence or to have assumed the risk. The District Court bottomed Union's liability on negligence, and awarded petitioner $20,000 in damages, the maximum allowable under the West Virginia Act, though finding that the actual damages were substantially higher. On Union's appeal to the Court of Appeals, the judgment was reversed. 256 F. 2d 449.

The Court of Appeals held that as a matter of law Union owed no duty to the employees of Amherst once the vessel had been turned over to the latter. It accordingly reversed the District Court's finding of negligence. It further held, contrary to the District Court, that the vessel was not unseaworthy at the time of the accident. and that in any event the decedent was not a person to whom the warranty of seaworthiness was owed. In the light of this determination, it did not pass on the question whether unseaworthiness would be in any event available as a ground for recovery in a West Virginia wrongful death action involving a maritime tort. We granted certiorari 359 U. S. 923.

This case was decided in the lower courts before the decision of this Court in *The Tungus* v. *Skovgaard*, 358 U.S. 588, where it was decided that it was a question of state law as to what is the proper substantive law to be applied to maritime torts within the territorial jurisdictions of the States in wrongful death cases. See *Hess* v. *United States, ante*, p. . Under this holding, in a maritime tort death case, the State might apply the substantive law generally applicable to wrongful death cases within its territory, or it might choose to incorporate the general maritime law's concepts of unseaworthiness or negligence.[1]

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[1] For examples of the general maritime law's concept of negligence, see *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625; *Pope & Talbot, Inc.*, v. *Hawn*, 346 U.S. 406, 409; *The Max Morris*, 137 U.S. 1, 14-15.

Here the Court of Appeals did not decide which standard the West Virginia Act adopted. It did not articulate on what basis it was applying federal law if in fact it was; there is no intimation that it believed the West Virginia Act incorporated the maritime law's negligence standard, and in fact it expressly left open the question whether that Act incoroprated the maritime standard of seaworthiness. It seems more likely to us to have passed on the negligence issue as a matter of federal maritime law; it cited only cases applying the general maritime law's and the Jones Act's concepts of negligence, and general treatises; no West Virginia authority was relied upon.[2] The least that can be said is that it is highly doubtful[3] which law the Court of Appeals applied;[4] and so in the absence of any expression by it of which standard the West Virginia Act adopted, we do not believe we can permit its judgment to stand after our intervening decision in *The Tungus*.

Accordingly, so that the Court of Appeals, which is closer than we to matters of local law, may pass upon the question of West Virginia law involved in the light of this Court's holding in *The Tungus*, we vacate its judgment and remand the cause to it to determine: (a) Whether the West Virginia Wrongful Death Act, as

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[2] The respondent here cites West Virginia precedents in an effort to sustain the Court of Appeals' determination.

[3] The views of the dissenting opinions here confirm us in our doubts. Some of the dissents take the view that the Court of Appeals should be affirmed because it undoubtedly decided the point as a matter of state law, while another is of the view that the Court of Appeals should be affirmed because it made sufficiently clear that it decided the point as a matter of federal law. Our views lie between these two.

[4] While the Court of Appeals declared that "The right to maintain such a suit can be enforced in admiralty only in accordance with the

to this maritime tort, employs the West Virginia or the general maritime law concept of negligence; and, in the light of its determination; (b) whether the district judge's finding as to negligence is correct under the proper substantive law. To facilitate our discretionary review of the Court of Appeals findings as to unseaworthiness, it should also determine whether the West Virginia Act incorporates this standard of the general maritime law in death actions involving maritime torts. Cf. *Barr* v. *Matteo*, 355 U.S. 171.[5]

Vacated and remanded.

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER joins, dissenting.

I dissent from the Court's disposition of this case on the following grounds:

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substantive law of the state whose statue is being adopted," 256 F. 2d, at 453, this discussion seems to us probably to have been in the context of the monetary limitation of the Act. Certainly there was no specific indentification of this statement with the discussion of whether the negligence finding was justified. And if the statement is taken to mean that a State cannot adopt the maritime standard, it is not correct.

[5] THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join this opinion, but solely under complusion of the Court's ruling in *The Tungus v. Skovgaard*, 358 U. S. 588. They believe that as long as the view of the law represented by that ruling prevails in the Court, it should be applied evenhandedly, despite the contrary views of some of those originally joining it that state law is the measure of recovery when it helps the defendant, as in *The Tungus*, and is not the measure of recovery when it militates against the defendant, as in *Hess* v. *United States*, *ante*, p. —. However, they note their continued disagreement with the ruling in *The Tungus*, and reserve their position as to whether it should be overruled, particularly in the light of the controversy application of it has engendered among it original subscribers. See the various separate opinions in the case and in *Hess v. United States*, *supra*.

First. For reasons elaborated in my Brother Stewart's dissenting opinion, there is no reasonable basis for concluding that the Court of Appeals' disposition of the negligence cause of action did not rest upon state substantive law, which is maritime wrongful death actions controls, *The Tungus* v. *Skovgaard,* 358 U.S. 588, if, as I expressed in my dissenting opinion in *Hess* v. *United States, ante,* p. , it does not impose duties greater than those created by maritime substantive law.

In any event, there being no suggestion that the state standards of duty differ in any way from those obtaining under maritime law, the remand of the negligence cause of action to the Court of Appeals seems to me to be a needless and therefore wasteful procedure.

Second. As to the unseaworthiness cause of action, no one suggests that West Virginia has such a doctrine of its own. The Court of Appeals deliberately decided (256 F. 2d. at 454) that it need not reach the difficult question of whether the West Virginia Wrongful Death Statute embraced a cause of action for unseaworthiness based on federal concepts, because it found that in any event, under federal law, the vessel was not unseaworthy, and that the petitioner was not one to whom the duty to provide a seaworthy ship was owing.

In resting its decision on these grounds the Court of Appeals exercised the traditional discretion of any court to choose what appears to it a narrower and clearer ground of decision in preference to a broader and more controverted one. The Court does not suggest that the limits of this discretion were exceeded in this instance. Cf. *Barr* v. *Matteo,* 355 U.S. 171. In my view we cannot properly require the Court of Appeals to decide a question which it intentionally and sensibly left open unless we first reverse that court on the issues which it did decide. This the Court does not do. Hence, I believe there is no justification for remanding the case on this score.

MR. JUSTICE WHITTAKER, dissenting.

I am persuaded that the Court of Appeals has made sufficiently clear that it thought this diversity, admiralty, death case was governed by the general maritime law, as *remedially* supplemented by the West Virginia Wrongful Death statute, and properly decided it on that basis.

The Court's opinion says that *The M/V Tungus* v. *Skovgaard*, 358 U.S. 588, "decided that it was a question of state law as to what is the property substantive law to be applied to maritime torts within the territorial jurisdiction of the States in wrongful death-cases, [and that] [u]nder this holding, in a maritime tort death case, the State might apply the substantive law generally applicable to wrongful death cases within its territory, or it might choose to incorporate the general maritime law's concepts of unseaworthiness or negligence." I do not understand the *Tungus* case to so hold, and if such a holding was intended by its author or by any of the Justices who joined it, it does not say so.

It seems to me that the substantive legal rights and liabilities involved in this admiralty case are not in any true sense governed by West Virginia law, but rather, are within the full reach of exclusive admiralty jurisdiction and are to be measured by the standards of the general maritime law. *Kermarec* v. *Compagnie General Transatlantic*, 358 U.S. 625, 628, as *remedially* supplemented by the West Virginia Wrongful Death statute. See *The Tungus, supra*. at 592.

Although state Wrongful Death statutes are not ones of survivorship and are generally spoken of as creating a *new* cause of action for death, it seems rather clear that the West Virginia Wrongful Death Statute, like most others, creates a cause of action only in the sense of providing a *remedy* for death resulting from an act made wrongful

by other laws—whether common, statutory or maritime laws—which would have redressed the wrong "if death had not ensued." W. Va. Code, 1931, § 5475 (5). And when, in a case encompassed by the terms of the State's Wrongful Death statute, admiralty "adopts" such statute, it does so only to afford a *remedy* for a substantive cause of action created by the maritime law which, "if death had not ensued," would have redressed it.

It is true that when admiralty "adopts" a State's Wrongful Death statute "it must enforce it as an integrated whole with whatever conditions and limitations the creating state has attached." *The Tungus, supra,* at 592. But the West Virginia Wrongful Death statute, like most such state statutes, apart from prescribing who may prosecute the action, the time within which it must be brought, and the measure and limit of recovery, has attached only the condition that the wrongful "act, neglect or default, [be] such as would . . . have entitled the party injured to maintain an action to recover damages in respect thereof [if death had not ensued]." W. Va. Code, 1931, § 5475 (5). Surely this means that the act, neglect or default, must be such as would, *under other laws*—whether common, statutory, or maritime laws—have entitled the party injured to recover damages in respect thereof "if death had not ensued."

Adoption by admiralty of such a remedial statute cannot be permitted to, and does not, so expand the essential purposes and characteristic features of the general maritime law as to interfere with its proper nation-wide hamony and uniformity, *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205; *Western Fuel Co.* v. *Garcia,* 257 U.S. 233, 242. By such adoption, admiralty takes over only the remedy afforded for death by the State's Wrongful Death statute—albeit the whole thereof. It does not thereby abandon the nonconflicting substantive admiralty law which gave rise

to the right of action that it would have enforced "if death had not ensued." In such a case, the real and substantive right in suit is still the one created by, and—to the extent not conflicting with the adopted State Wrongful Death statute—is governed by, the maritime law.

This is what I understood the *Tungus* case to mean when I joined it, and re-examination of it confirms that conclusion. I submit there is not a word in it to the contrary. And this conclusion is buttressed by the dissent in that case. Although this Court has many times and uniformly held that the maritime law creates no cause of action for wrongful death, and that, in circumstances like these, admiralty "adopts" the State's Wrongful Death Act, the dissent in *Tungus* said, in effect, that admiralty would merely look to see whether the State had enacted a wrongful death statute and, if it had, would not "adopt" that act but would put it aside and fashion its own remedy for wrongful death, 358 U.S., at 608-609, which, I thought and still think, is contrary to this Court's cases holding that the maritime law does not create a cause of action for wrongful death and that, in actions for wrongful death arising on the territorial waters of a State, admiralty "adopts" the State's Wrongful Death Act *cum onere*.

I believe that the opinion of the Court of Appeals makes reasonably clear that the court regarded this case as governed by, and that it applied, the general maritime law as remedially supplemented by the West Virginia Wrongful Death statute. I also believe that the court correctly concluded that the maritime doctrine of unseaworthiness was not applicable, and that respondent was not guilty of negligence causing or contributing to cause the death of petitioner's decedent, because, as it found, the barge was both withdrawn from navigation for extensive repairs and completely out of respondent's control—points we thoroughly explored and decide only the other day. *West* v. *United States*, 361 U.S. 118. I would affirm.

Decision of the Supreme Court of the United States

[January 18, 1960.]

MR. JUSTICE STEWART, dissenting.

I.

In this wrongful death action it was incumbent upon the Court of Appeal to apply the substantive law of West Virginia. The Court today finds it "highly doubtful" whether the Court of Appeals did so. I entertain no such doubt for the following reasons: (1) This Court's "intervening decision"[1] in *The Tungus* v. *Skovgaard*, 358 U.S. 588, announced no new principle, but simply restated a doctrine well established in this Court. (2) Long before the decision in *The Tungus*, this doctrine had been specifically recognized as the law in the Fourth Circuit. (3) The express language of the Court of Appeals' opinion in the present case makes clear that the court understood that its function was to apply West Virginia law, and that it did so.

Our decision in *The Tungus* simply reaffirmed a principle articulated in many decisions of this Court. This principle, compendiously stated, is that admiralty enforces "the *obligatio*" created by a state wrongful death action "as it would one originating in any foreign jurisdiction." *Levinson* v. *Deupree*, 345 U.S. 648, 652. See *The Harrisburg*, 119 U.S. 199; *The Hamilton*, 207 U.S. 398; *La Bourgogne*, 210 U.S. 95; *Western Fuel Co.* v. *Garcia*, 257 U.S. 233.[2] Under this weight of authority, it could be presumed

[1] The judgment of the Court of Appeals in the present case was entered May 27, 1958. The decision of this Court in *The Tungus* was announced February 24, 1959.

[2] The law took a different turn with respect to the state workmen's compensation laws. See *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205. Such legislation was differentiated from the state wrong-

that the Court of Appeals for the Fourth Circuit would recognize, as other federal courts have recognized whenever the specific question has arisen, that the right to recover for wrongful death occurring on the navigable waters of a State is to be determined by reference to state law.[3]

But there is no need to indulge in such a presumption, because the Court of Appeals for the Fourth Circuit, several years before the present case was decided, manifested a thorough understanding of the controlling doctrine exactly in accord with the principles confirmed by this Court last Term in *The Tungus*. In *Continental Casualty Co.* v. *The Benny Skou*, 200 F. 2d 246 (C. A. 4th Cir. 1952), a suit to recover for a death occurring on board a ship in the territorial waters of Virginia, the court held that the action was barred by the one-year limitation contained in the Virginia Wrongful Death Act. The court's reasoning was unambiguous: "The right of action which appellant has sought to enforce is one created solely by the Virginia statute. . . . 'Virginia has bestowed upon

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ful death statutes because of the greater burden imposed on shipowners by "heavy penalties and onerous conditions" of the compensation statutes, and because of the "novel remedies incapable of enforcement by an admiralty court." *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 166. More than 15 years ago this Court pointed out that "[T]he *Jensen* case has already been severely limited, and has no vitality beyond that which may continue as to state workmen's compensation laws." *Standard Dredging Co.* v. *Murphy*, 319 U.S. 306, 309. Cf. *Davis* v. *Department of Labor*, 317 U.S. 249; *Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272.

[3] See, *e.g.*, *Turner* v. *Wilson Line of Massachusetts*, 242 F. 2d 414 (C.A. 1st Cir.); *United Pilots Assn.* v. *Halecki*, 251 F. 2d 708 (C.A. 2d Cir.), judgment vacated and cause remanded, 358 U.S. 613; *Curtis* v. *A. Garcia y Cia.*, 241 F. 2d 30 (C.A. 3d Cir.); *Graham* v. *A. Lusi, Ltd.*, 206 F. 2d 223 (C.A. 5th Cir.); *Lee* v. *Pure Oil Co.*, 218 F. 2d 711 (C.A. 6th Cir.).

admiralty a right to grant a recovery not previously possessed by admiralty. The endowment must be taken *cum onere.*' As appellant grounds his action upon the Virginia statute, he is obliged to accept the statute in its entirety as construed by the Virginia court of last resort.'' 200 F. 2d, at 250.

Even if the Court of Appeals for the Fourth Circuit had not previously expressed such a clear understanding that cases like these are controlled by the substantive law of the State. I think that its opinion in the present case, standing alone, unambiguously shows a recognition of the duty to apply the substantive law of West Virginia. What the court said seems to me quite clear: ''The maritime law does not allow recovery for wrongful death. . . . The right to maintain such a suit can be enforced in admiralty only in accordance with the substantive law of the state whose statute is being adopted. The endowment must be taken *cum onere.*'' 256 F. 2d, at 453. This Court's suggestion that the above language was confined to the issue of the monetary limitation upon damages in the West Virginia statute is to me entirely unconvincing, because the Court of Appeals never reached the question of damages.

II.

Even if I were able to agree that it is uncertain whether the Court of Appeals decided this case under standards of state or federal law, I still could not join in the Court's judgment. For even if the Court of Appeals mistakenly applied substantive standards of federal maritime law, no purpose could be served by remanding this case unless it were shown that the state law is somehow more favorable to the petitioner. But there has been no showing—

nor any suggestion—that the law of West Virginia is in any way more favorable to plaintiffs than the general maritime law.[4] Contrast *Hess* v. *United States, ante*, p. .

A remand of this case is equally pointless on the issue of whether, as a matter of West Virginia law, the state death statute incorporates the maritime duty of providing a seaworthy vessel. The district judge found that the barge was unseaworthy, but went on to hold that "this case is not one for the applicability of the doctrine of liability without fault." The Court of Appeals expressly refrained from deciding whether the West Virginia Wrongful Death statute has imported the maritime concept of unseaworthiness, finding that the circumstances of this case were not such as to impose liability under that concept, even if incorporated in the state statute. The court found as a fact that the barge was not unseaworthy, and held as a matter of law that in any event there could be no warranty of seaworthiness with respect to a vessel withdrawn from navigation and delivered into the sole custody and control of a dry dock company for the purpose of major repairs. Only last month we unanimously held that this view of the scope of unseaworthiness liability is correct. *West* v. *United States*, 361 U.S. 118. There is no point in requiring the Court of Appeals to make what would would therefore be so completely irrelevant an inquiry into an elusive question of state law.

I would affirm.

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[4] Indeed the case was submitted to us upon the *contrary* assumption. The petitioner's argument was pitched upon his contention that we should overrule *The Harrisburg*, 119 U.S. 199, so that his rights could be determined under *federal* law. The respondent relied upon West Virginia decisions in urging affirmance.

Opinion of the United States Court of Appeals For the Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7588

Union Carbide Corporation, a corporation,
Defendant and Third Party Plaintiff below,
Appellant and Cross-Appellee,

versus

Ellen Goett, As Administratrix of the Estate of
Marvin Paul Goett, deceased, Plaintiff below,
Appellee and Cross-Appellant,
and
Amherst Barge Company, a corporation,
Third Party Defendant below,
Appellee.

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON. BEN MOORE, DISTRICT JUDGE.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

(Argued March 28, 1960. Decided April 19, 1960.)

Before SOBELOFF, Chief Judge, SOPER, Circuit Judge, and THOMSEN, District Judge.

Opinion of the United States Court of Appeals for the Fourth Circuit

Harvey Goldstein (Ernest Franklin Pauley and S. Eldridge Sampliner on brief) for Ellen Goett, As Administratrix etc., Appellee and Cross-Appellant; Charles M. Love (Charles R. McElwee on brief) for Union Carbide Corporation, Appellant and Cross-Appellee; and David D. Johnson (Jackson, Kelly, Holt & O'Farrell, and W. T. O'Farrell on brief) for Amherst Barge Company, Appellee.

THOMSEN, District Judge:

The Supreme Court has remanded this case, *Goett* v. *Union Carbide Corp.*, 361 U.S. 340, so that this court may determine three questions, stated by the Supreme Court as follows:

> "(a) Whether the West Virginia Wrongful Death Act, as to this maritime tort, employs the West Virginia or the general maritime law concept of negligence; and, in the light of its determination, (b) whether the district judge's finding as to negligence is correct under the proper substantive law. To facilitate our discretionary review of the Court of Appeals' findings as to unseaworthiness, it should also determine whether the West Virginia Act incorporates this standard of the general maritime law in death actions involving maritime torts."

The facts are fully stated in the original opinion of this court, 256 F. 2d 449, and are summarized in the opinion of the Supreme Court.

A.

The Tungus v. *Skovgaard*, 358 U.S. 588, and *United Pilots Assn.* v. *Halecki*, 358 U.S. 613, as interpreted by a majority of the Supreme Court in *Goett* and in *Hess* v.

United States, 361 U.S. 314, held that "in an action for wrongful death in state territorial waters the conduct said to give ries to liability is to be measured not under admirality's standards, but under the substantive standards of the state law." 361 U.S. at 319. "Under this holding, in a maritime tort death case, the State might apply the substantive law generally applicable to wrongful death cases within its territory, or it might choose to incorporate the general maritime law's concepts of unseaworthiness or negligence." 361 U.S. at 342.

In his dissents in *Hess* and *Goett*, 361 U.S. 339 and 344, Mr. Justice Whittaker, who was one of the majority of five in *Skovgaard* and *Halecki*, has stated that he does not interpret *Skovgaard* in the manner quoted above, and has indicated that he believes such cases are governed by "the general federal maritime law as remedially supplemented by the State's Wrongful Death Act". This brings him close to the position of the four justices who dissented in *Skovgaard* and *Halecki* and concurred "under compulsion" in *Hess* and *Goett*. It is not for us to resolve this problem; and in the view we take of the law it would make no difference in our answer to question (b) whether we follow the rule stated in the "Opinion of the Court" in *Hess* and in *Goett* or the rule suggested by Mr. Justice Whittaker in his dissents.

There is no West Virginia case in point, although the Supreme Court of West Virginia has held that its Wrongful Death Act should be liberally construed. *Richards* v. *Riverside Iron Works*, 56 W. Va. 510, 49 S.E. 437. We have considered the arguments on both sides so well developed in the majority and minority opinions of the Second Circuit in *Halecki*, 251 F.2d 708, and of the Third Circuit in *Skovgaard*, 252 F.2d 14, which construed a statute essentially similar to the West Virginia Act. See also *Holly*

v. *S.S. Manfred Stansfield*, 4 Cir., 269 F.2d 317, and *State* v. *A/S Nabella*, D.Md., 176 F. Supp. 668, noting that the construction of the Virginia and Maryland Acts was aided by comparatively recent amendments to those Acts, giving the right to proceed in rem against a ship. There is no such provision in the West Virginia Act; that is an element to be considered, but it is not conclusive, since this is not an action in rem.

The West Virginia statute, like most wrongful death statutes, provides basically that if death is caused by an act, neglect or default which would have entitled the injured party to maintain an action if he had lived, then the person who would have been liable for the injury will be liable under the statute for the death. If Goett had survived he could have brought an action against Union Carbide in the West Virginia courts for the alleged negligence and unseaworthiness, and his right to recover in such an action would have been governed by general maritime law. It is true that such an action based on unseaworthiness was not recognized in 1863, when the West Virginia Wrongful Death Act was adopted, and that the principles presently controlling the negligence aspect of such an action had not been fully developed. We find, however, that the West Virginia legislature, in adopting the Wrongful Death Act, did not intend to limit recovery thereunder to actions based on the wrongful acts, neglects and defaults with which the legislators who adopted it were familiar, but that the statute was intended to cover all wrongful acts, neglects and defaults which from time to time would entitle an injured party to maintain an action under the applicable substantive law, whether the common law, statutory law or maritime law. The West Virginia courts apply all three, in appropriate cases.

We conclude that in a maritime tort death case West Virginia would "choose to incorporate the general maritime law's concepts of unseaworthiness and negligence".

Counsel for Union Carbide argues that such a construction of the West Virginia Act violates the separation of powers doctrine, that a state legislature cannot delegate its law-making power to another branch of government, whether judicial or legislative. We have found no authority supporting Union Carbide's argument. No delegation of law-making power is involved. The separation of powers doctrine does not require that the Wrongful Death Act be frozen so that it cannot respond to the development of the common law, as interpreted by West Virginia courts, or to the development of the maritime law.

B.

Although we have concluded that the Supreme Court of West Virginia would apply maritime law concepts of negligence in such a case as this, we do not believe that it would run ahead of the federal courts and create duties not heretofore recognized or enforced by the Supreme Court of the United States or by the weight of other federal authority, and not applied by West Virginia courts in analogous situations.

In our former opinion in this case we said: "Nor was Carbide negligent in delivering the barge to Amhurst without mounting life rings or other safety equipment on the barge, or in failing to rescue Goett after he fell into the river, as contended by his administratrix. There is, of course, a duty on a vessel and her owners to have life saving equipment available to rescue members of her crew who fall overboard while the vessel is in operation. *Sadler* v. *Pennsylvania R. Co.*, 4 Cir., 159 F.2d 784, and cases cited. A similar duty is owned to business visitors who come

aboard while the vessel is in the custody and control of her owners. But in the instant case Carbide had delivered the barge into the sole custody and control of Amherst. Carbide's duty under thse circumstances was to warn Amherst and its employees of any hidden danger or latent defect in the barge. It was the duty of Amherst to supply its employees with a reasonably safe place in which to work. It knew and controlled the conditions of the work and the equipment which would be used. It was Amherst's responsibility to decide whether a temporary railing or stanchion should be erected, whether its men should be required to wear preservers, and whether and where life rings and other rescue equipment should be mounted. For negligence in any of these respects it would be liable to plaintiff herein for damages, were it not for the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. secs. 901-950. But Carbide is not liable to plaintiff for negligence; it breached no duty it owed to Goett. *Lester* v. *United States,* [2 Cir., 234 F.2d 62, cert. den. 352 U.S. 889]; *West* v. *United States* [E.D. Pa., 143 F. Supp. 473]; *Raidy* v. *United States* [D. Md., 153 F. Supp. 777, aff'd 4 Cir., 252 F.2d 117]; 38 Am. Jur., Negligence, sec. 97; Restatement, Torts, sec. 340, 343; Harper and James, The Law of Torts, vol. 2, sec. 21.1."

Since our opinion in this case was written *West* has been affirmed by the Third Circuit, 256 F.2d 671, and by the Supreme Court, 361 U.S. 118, emphasizing the importance of control of the vessel at the time of the injury as the decisive factor on both aspects of the case, negligence and unseaworthiness. See also, *Halecki, supra. Kermarec* v. *Compagnie Generale Transatlantique,* 358 U.S. 625, and *Lawlor* v. *Socony Vacuum Oil Co.,* 2 Cir., F.2d , at , in all of which the vessel was in the control of the owner. The owner was also in general control of the vessel

in all the stevedore and other cases cited by libelant. We adhere to our previous opinion on this point as a proper application of the general maritime laws' concept of negligence. It is also in line with the principles applied by West Virginia courts in analogous situations. *Sesler* v. *Coal Co.*, 51 W. Va. 318, 41 S.E. 216. Cf. *Robert* v. *Axe and Tool Co.*, 101 W. Va. 276, 148 S.E. 70, where the owner was in control of the premises. See also *Trimyer* v. *Norfolk Tallow Co.*, 192 Va. 776, 66 S.E. 2d 441.

C.

As stated above, we believe the West Virginia Act incorporates the general maritime law of unseaworthiness in death actions involving maritime torts. Our previous findings that Goett was not a person to whom the warranty of seaworthiness ran, and that the barge was not unseaworthy, is supported by the decision of the Supreme Court in *West, supra.* See also *Lawlor, supra.*

We adhere to our decision that judgment should have been rendered in favor of the defendant.

Opinion of the United States Court of Appeals For the Fourth Circuit on Motion for Enlargement

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7588

UNION CARBIDE CORPORATION,

Appellant,

versus

ELLEN GOETT, as Administratrix of the Estate of Marvin Paul Goett,

Appellee.

ORDER

Upon consideration of a motion for enlargment of the time to petition for a rehearing in this case which was decided May 27, 1958, the court denies the motion.

s/ CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

s/ SIMON E. SOBELOFF
United States Circuit Judge

s/ ROSZEL C. THOMSEN
United States District Judge

FILED
Mar. 13 1969
SAMUEL W. PHILLIPS
Clerk

(SEAL)

A True Copy, Teste:
SAMUEL W. PHILLIPS, Clerk
By MARGARET P. ATKINS
Deputy Clerk